IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11841 of 2003

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SANJAY HIRALAL SHAH - Petitioner(s)
Versus
KRISHNAKANT PANDYA & 3 - Respondent(s)

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Appearance :
MR ASHISH M DAGLI for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2, 4,
MR PR THAKKAR for Respondent(s) : 3,

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 11/07/2006

ORAL JUDGMENT

1. This petition challenges the order dated 28th July, 2003, passed by the learned Civil Judge (S.D.), Vadodara, below Exh.72 in Special Civil Suit No.389 of 2001. By the said application the petitioner had prayed for withdrawal of the

amount of Rs.5 lacs, deposited by the defendants in compliance with the order passed below application for leave to defend at Exh.11 in Special Summary Civil Suit No.389 of 2001.

2. The petitioner had instituted a Special Summary Suit No.389 of 2001 before the Civil Judge (S.D.), Vadodara, under Order 37 of the Code of Civil Procedure, to recover an amount of Rs.11,00,141/- (Rupees Eleven Lacs One Hundred and Forty One Only) from the respondents/defendants. The petitioner applied for Summons for Judgment whereas the respondents applied for unconditional leave to defend. The learned Civil Judge (S.D.), Vadodara by order dated 5th June, 2002 granted leave to the respondents to defend the suit on condition to deposit Rs.5 lacs within sixty days from the date of the order.

3. Pursuant to the aforesaid order dated 5th June, 2002, the respondents No.2 and 3 deposited the amount of Rs.5 lacs with the Civil Court (S.D.), Vadodara.

4. Thereafter, the petitioner-plaintiff moved an application at Exh.72 praying that he may be permitted to withdraw the amount of Rs.5 lacs deposited by the defendants upon any condition that may be imposed by the Court. By the impugned order dated 28th July, 2003, the learned

Civil Judge (S.D.), Vadodara was pleased to reject the aforesaid application with the direction that the amount of Rs.5 lacs be deposited in Fixed Deposit of any Nationalised Bank. Being aggrieved by the aforesaid order, the petitioner has moved the present petition.

5. Heard Mr. Ashish Dagli, learned advocate for the petitioner and Mr. P.R.Thakkar, learned advocate on behalf of the respondents.

6. Learned advocate for the petitioner submitted that against the order granting conditional leave to defend, the respondents had filed a writ petition before this Court, being Special Civil Application No.7813 of 2002, wherein this Court upon being satisfied as regards the claim of the petitioner had, at the time of issuance of notice, directed the respondents to furnish bank guarantee for the full amount of Rs.5 lacs (principal amount). By an order dated 5-5-2003, the said petition was summarily rejected. That the said order was carried in appeal before this Court by way of Letters Patent Appeal No.462 of 2003 which was dismissed by judgment and order dated 9-5-2003.

7. It was pointed out that while confirming the aforesaid order granting conditional leave to defend, the Division Bench has observed that a bare reading of the order impugned in the appeal

would indicate that the learned trial Judge has come to the conclusion that the appellants have no defence and that the defence is illusory. However, the learned Judge has shown mercy to the appellants by enabling them to try to prove the defence pleaded by them and imposed condition of depositing Rs.5 lacs which is less than 50 % of the total claim in the suit. It was submitted that where leave to defend has been granted by way of mercy, it would be open to impose a condition to permit the plaintiff to withdraw the money on furnishing bank guarantee or security or otherwise to the satisfaction of the Court. Reliance was placed upon a decision of the Bombay High Court in the case of *Suraj Sanghi Finance Ltd. v. Credential Finance Ltd. and others,* reported in *A.I.R. 2002 BOMBAY 481* in support of the said contention. It was accordingly urged that the trial Court ought to have permitted the petitioner to withdraw the money on furnishing security to the satisfaction of the Court.

8. Learned advocate for the petitioner further submitted that the petitioner and his wife had filed affidavits before this Court stating that the petitioner was holding property of the description set out therein, and that the petitioner undertakes not to dispose of the said property in any manner till the final hearing of the suit and that the petitioner would also

abide by any further terms and conditions imposed by this Court in the event of permitting the petitioner to withdraw the amount, also qua movable property disclosed by him,as a security. It was submitted that in the circumstances, the trial Court ought to have allowed the petitioner's application and permitted the petitioner to withdraw the amount deposited by the respondents. Reliance was placed upon the decision of the Apex Court in the case of *Mrs. Raj Duggal v. Ramesh Kumar Bansa,* reported in *A.I.R.1990 Supreme Court 2218* to submit that in the said decision the appellant therein had been granted leave to defend the suit on condition that the amount of Rs.20,000/- deposited in the said case pursuant to the earlier orders made in the proceeding, shall, during the pendency of the suit, be paid to and retained by the respondent-plaintiff subject to the condition that if ultimately the respondent-plaintiff fails in his suit, he shall be liable to restitute the said sum of Rs.20,000/- to the appellant-defendant with interest thereon at 9 % per annum. It is submitted that the trial Court ought to have followed the said decision and permitted the petitioner to withdraw the amount of Rs.5 lacs, subject to the condition that if ultimately the petitioner fails in his suit, he shall be liable to restitute the same to the respondent.

9. Mr. P.R.Thakkar, learned Advocate for the respondents submitted that the question as to whether the petitioner should be permitted to withdraw the money that was directed to be deposited as a condition for granting the defendant leave to defend would arise at the time of granting leave to defend, and should form part of the said order. It was submitted that once the order is passed below the application seeking leave to defend, and the same is complied with, the Summary Suit is treated like an ordinary suit and has to be decided on its merits. It was contended that condition of withdrawal of money has to form part of the order granting leave to defend, and that no application for withdrawal of amount deposited pursuant to an order granting conditional leave to defend can be entertained, as the same would amount to seeking modification/review of the earlier order. It was submitted that the suit is yet to be adjudicated on merits and that the application submitted by the petitioner on the assumption that the suit is likely to be decreed in his favour, is premature.

10. Learned Advocate for the respondents submitted that while granting leave to defend, the learned Judge had formed an opinion that withdrawal is not justified and had, accordingly, exercised discretion at the relevant time. It was

submitted that there is no provision under the law permitting such withdrawal ; hence, the Trial Court had rightly rejected the application of the petitioner.

11. The learned advocate also drew the attention of the Court to the affidavit in reply filed on behalf of the respondent Nos.2 and 3 to point out the poor financial condition of the petitioner. It was submitted that looking to the financial condition of the petitioner, it may be difficult, if not impossible for the respondents to recover the moneys, in case the petitioner-plaintiff fails in the suit. It was submitted that the impugned order is passed on an interlocutory application and that the trial Court has exercised discretion citing reasons for exercising its discretion. It was submitted that no jurisdictional error has been pointed out nor has the petitioner made out any case for intervention on the ground of perversity of the impugned order. In the circumstances, it was submitted that the petition being devoid of any merit, does not call for any interference on the part of this Court.

12. Learned advocate for the respondents has relied upon the decision of the Supreme Court in the case of *M/s. Estralla Rubber v. Dass Estate (P) Ltd.* reported in *2001 (7) Supreme 53* for the proposition that exercise of power by a High

Court under Article 227 of the Constitution of India in interfering with the orders of the Courts or Tribunal is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if High Court does not interfere, a grave injustice remains uncorrected. That the High Court while acting under this Article cannot exercise its powers as an appellate Court or substitute its own judgment in place of that of the subordinate Court to correct an error, which is not apparent on the face of the record.

13. Reliance was also placed upon a decision in the case of *M/s Essen Deinki v. Rajiv Kumar* reported in *2002 (7) Supreme 393,* for the proposition that the exercise of jurisdiction under Article 227 of the Constitution of India is limited and restrictive in nature, that the same has to be exercised in the normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice. That it is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the Court below. It was submitted that the Trial Court has in no manner transgressed the limits of its jurisdiction. Hence, no interference is called for at the hands of this Court.

14. As is apparent from the facts on record, the Trial Court while granting leave to defend vide order dated 5th June, 2002 had not thought it fit to permit the petitioner to withdraw the moneys directed to be deposited as a condition for granting leave to defend. No such request for permission to withdraw the money appears to have been made during the course of hearing of the respondent's application for leave to defend. Therefore, the Trial Court, at the relevant time after considering the facts and evidence on record, had exercised its discretion and passed an order granting conditional leave to defend. Hence, the learned Advocate for the respondents is justified in submitting that the Trial Court had formed the opinion that withdrawal of the amount is not justified and had exercised its discretion accordingly. The said order has attained finality. The respondent had challenged the said order before this Court by way of Special Civil Application as well as further appeal by way of Letters Patent Appeal, but had failed. The petitioner was not aggrieved by the said order and had, therefore, not carried the same any further. Whereas, now under the guise of seeking leave to withdraw the moneys the petitioner in effect and substance appears to be seeking review/modification of the order dated 5th June, 2002 made on the respondent's application seeking leave to

defend; that too, on the basis of a subsequent order passed in proceedings(LPA No.462 of 2003) arising out of the said order.

15. The learned Advocate of the respondents appears to be right in contending that there is no provision of law which permits withdrawal of moneys deposited during the pendency of the suit, after an order granting leave to defend has been made. This Court is of the view that the issue as regards granting leave to withdraw the moneys directed to be deposited as a condition for granting leave to defend, has to be considered while passing the order on the application seeking leave to defend. Once the stage of granting leave to defend is crossed, and the same is complied with, there is no other stage for imposing any further condition. In case the petitioner's application is allowed, the same would amount to modifying the order granting leave to defend, as it would tantamount to adding a further condition for granting leave to defend.

16. Moreover, the entire edifice of the petitioner's case is based upon the order passed by the Division Bench of this Court in the Letters Patent Appeal preferred by the respondents challenging the order of the learned Single Judge whereby the respondents' petition challenging the order imposing condition while

granting leave to defend, was rejected. Placing reliance upon the decision of the Bombay High Court in the case of *Suraj Sanghi Finance Ltd*. (Supra), it is sought to be contended that as the Division Bench was of the view that leave to defend has been granted by way of mercy, the petitioner ought to have been permitted to withdraw the amount deposited. At this juncture it may be pertinent to refer to the following observations made by the Bombay High Court in the said decision :

> *"6. XXXXXX In M/s Classic Strips Pvt. Ltd (Supra) conditional leave was granted without leave to withdraw the money. Leave was granted on the defendants depositing the money with Prothonotary & Senior Master. An appeal was preferred against the said order. The appeal was dismissed. Matter then came up before the Chamber Judge. At that stage, an oral application was moved for withdrawal of moneys. That was granted. It was that order that was challenged. The learned Division Bench observed that the Chamber Judge would have no jurisdiction to pass such order. To my mind the judgment would be clearly distinguishable for reasons to be stated. XXXXXXXXXX Thirdly the matter before the Division Bench of this Court arose in a case where no condition was imposed while granting leave to the defendant to defend the suit, to withdraw the money. On the contrary it was directed to be deposited. That judgment was based on those facts, therefore, would be of no assistance as it is clearly distinguishable. The issue in issue in that case, was whether in a case where leave to defend has been granted with a condition to deposit the money, but without a direction for*

withdrawal, could the Chamber Judge direct the withdrawal of the money on furnishing security or otherwise."

17. The facts of present case are akin to the facts of the Division Bench decision referred to in the aforesaid decision, in that, conditional leave was granted without leave to withdraw the money. The petitioner has sought withdrawal by subsequently filing an application seeking leave to withdraw. Hence, the aforesaid decision of the Division Bench wherein it was held that the Chamber Judge has no jurisdiction to pass such order would be squarely applicable to the facts of the present case. In the circumstances, reliance placed upon the said decision is misconceived. On the contrary, the said decision strengthens the case of the respondents.

18. In any case the petitioner cannot base his case for withdrawal of the moneys deposited in compliance of the order granting conditional leave to defend upon a decision passed in proceedings challenging the very same order granting conditional leave to defend. If the petitioner was of the view that, on the facts of the case, he was entitled to withdraw the amount, the same ought to have been pleaded during the course of hearing of the application seeking leave to defend ; and in case the same was not granted by challenging the said order. By not doing so and permitting the order

granting conditional leave to defend to become final, the petitioner has missed the bus and cannot now be permitted to indirectly seek modification of the said order.

19. Reliance placed by the petitioner upon the decision of the Apex Court in case of *Mrs. Raj Duggal (Supra)*, does not carry the case of the petitioner any further. In the said case, the condition for withdrawal of moneys was imposed while granting leave to defend and it is not even the respondents' case that such a condition cannot be imposed while granting leave to defend. But as held hereinabove, such a condition has to form part of the order granting leave to defend ; and it is not permissible for the Court to entertain a subsequent application for withdrawal of moneys deposited pursuant to an order granting conditional leave to defend.

20. As can be seen from the order of the Trial Court, after considering the facts of the case, the Trial Court has come to the conclusion that in order to ensure the safety of the deposited amount of money as well as earning of interest thereon, investing the deposited amount of money in Fixed Deposit of any nationalised bank would serve the ends of justice, and, at the same time, would protect the interest of both the parties. The trial Court has come to the aforesaid conclusion upon appreciation of the

evidence on record and the submissions made by the learned advocate for the parties.

21. It is settled legal position that the power of superintendence conferred by Article 227 of the Constitution is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. In the facts of the present case, no jurisdictional error is pointed out nor is any case made out on the ground of perversity, so as to warrant any interference by this Court.

22. In the result, the petition fails and same is accordingly rejected. Rule is discharged with no order as to costs.

23. By an order dated 17th September, 2003, interim relief had been granted to the effect that the amount deposited by the respondent with the trial Court shall not be invested. Learned advocate for the petitioner states that pursuant to the said order the said moneys have not been invested. In view of the rejection of the Special Civil Application, the interim relief stands vacated. The moneys deposited with the trial Court shall be invested in terms of the order dated 28th July, 2003, without any further delay. Since loss of interest has been occasioned on account of the interim relief

granted in favour of the petitioner, in case, the petitioner succeeds in the suit, he shall not be entitled to a sum equal to the loss of interest for the period during which the interim relief was operating. In case, the petitioner fails in the suit, he shall be liable to compensate the respondents to the extent of loss of interest, had the moneys been deposited in terms of the order dated 28th July, 2003.

(HARSHA.N.DEVANI, J.)

*mithabhai